

THE SCOOP

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Editor's Notes:



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Special Needs Planning

Parenting is one of the biggest, if not the biggest, investments a person can make in their lifetime. In addition to requiring a financial commitment, parenting demands a person's constant attention and energy. While most parents realize a decrease in responsibilities over time as their children near adulthood, those with children that have special needs will often continue having responsibilities for the rest of their lives. In addition, parents of children with special needs have to think about the well being of their children long after they are gone.

There are financial concerns such as making sure the surviving child with special needs has enough resources to maintain a comfortable life without compromising potential public benefits that may be available to fund the child's care. Advocacy for their children, such as providing a clean living environment and keeping them from being institutionalized construe non-financial concerns. Together, these concerns lead parents to take action by creating a **Special Needs Trust (SNT)**, also called a Supplemental Needs Trust.

A Trust is a private agreement between a grantor and a trustee, for the benefit of the beneficiary. In some instances, a trust is not necessary for the preservation of public benefits. Recipients of public benefits receive either (1) **Needs-based** or (2) **Entitled** benefits. Needs-based benefits include **Supplemental Security Income (SSI)** from the federal government, and in certain states like California, Medi-Cal. Entitled benefits are those that are earned based on payment into a program such as Social Security and are received in the form of Social Security Disability Insurance (SSDI) and Medicaid. Typically, those receiving entitled benefits do not need a special needs trust. For

those receiving needs-based benefits, a SNT is highly encouraged so that precious resources are preserved and no opportunities are lost.

SSI is designed to provide modest monthly benefits for food and shelter. The maximum benefit that a person can receive is calculated using a complex and cloudy formula. This benefit may be reduced by any **Countable Income**. In a nutshell, if they think you already have too much, other benefits you were depending on will be reduced.

Such Countable Income can include both earned income and unearned income. Examples of earned income include wages and some rental income and royalties, while unearned income includes things like private pensions, inheritances, gifts and in-kind support and maintenance you assumed was just rooted in the basic generosity of a good parent. To complicate matters, the formula that is used to reduce benefits varies based on the source of income. For example, while unearned cash income reduces benefits on a dollar for dollar basis, in-kind support such as room and board uses a completely separate calculation. These hidden traps show why it is critical that parents with a special needs child should be very careful in the planning manner in which they leave resources for their child's well being.

Third Party Special Needs Trust

Parents with a child receiving needs-based benefits generally should create what is called a third-party SNT. It is referred to as such because someone other than the primary beneficiary funds the trust; meaning contributes the assets inside the trust to benefit their child. In most cases, these are the parents.

One of the benefits of a third-party SNT is the fact that the trust can be changed or revoked without negatively impacting the public benefits of the child. This flexibility allows parents to make changes should different circumstances, new laws or new tools come into play in the future. For those who plan on funding the third-party SNT with gifts from others, an irrevocable trust may be considered, as it would give some additional assurances to donors.

While the third-party SNT is designed to provide for the special needs child without reducing public benefits, special care must be taken that the terms of the trust are not so broad as to go beyond the purposes of supplemental needs. A narrowly written trust agreement allows more predictability and creates opportunities to shield the assets in the trust from creditors, predators, in-laws and outlaws. In some jurisdictions, distribution instructions in the trust can be considered too



broad and may unwittingly classify assets as unearned income. When such a determination is made, the public benefits may be reduced and in some cases eliminated.

Lawmakers subscribe to the philosophy that the SNT is there to merely supplement government benefits, not replace them. The privileges that the third-party SNT enjoys continue so long as it is designed to supplement the needs-based public benefits. As an example, distributions for food and shelter are generally not made from the trust, as it may be considered in-kind support and maintenance. Recall from earlier, the purpose of SSI is limited to providing for food and shelter, so other expenses must be handled through a different funding source like the SNT.

When it comes to drafting the third-party SNT, exactly where the beneficiary will reside along with whom they reside with will impact these calculations. Therefore, it is imperative that those who consider implementing such trusts work with a qualified attorney and financial professional.

Funding The Trust

The trust can exist while the parents are alive, or it can spring to action upon the death of the parents. If the latter, Special Needs Provisions can be incorporated into the parents' overall living trust centered estate plan.

With the option to create the trust now, while parents are still around, current planning allows for the opportunity to transfer assets in a more managed way and allowing the trust to be the beneficiary of life-insurance policies that won't disqualify the child from receiving government benefits.

The first step in properly funding the trust requires calculating the future needs as well as the utilization of tax-efficient techniques. When it comes to this calculation, it is important to seek the advice of a planning professional with focused experience on designing a model for people with special needs or disabilities.

There are multiple ways to fund the trust. Some choose to use their retirement assets, while in the majority of cases, life insurance, if designed by a professional qualified in special needs planning, is the tool of choice because of its flexibility. As we saw with the complexity of the financial calculations, not every person who holds a life insurance license is qualified to implement the funding of a SNT. Given that there may be limited resources to fund both a retirement and a special needs trust, a comprehensive financial plan is recommended. Particular attention must be paid to protect the ability of those responsible for funding the trust to completion.

Well-designed gifting programs have always been able to stretch the value of a dollar. If such a gifting program is being used to fund the third-party SNT, special considerations must be given, since granting *Crummey* withdrawal rights to the recipient of the needs-based benefit will likely disqualify them from receiving SSI benefits and protecting the assets of the trust from creditors, predators, in-laws and outlaws.

Maintaining The Trust

As mentioned earlier, a third-party SNT may be revocable. Given that laws constantly change in regards to benefits and taxation, it is important that not only you stay informed, but so too does your appointed trustee. The complexity of these trusts will often lead parents to hire a professional trustee. This of course comes with an added cost, as well as giving up control. Some choose to name a family member as a co-trustee, while others simply choose to name family members such as siblings who know the beneficiary well in lieu of a professional trustee.

26 USC 529A: Qualified ABLE programs

As part of the Tax Increase Prevention Act of 2014, ABLE accounts came into existence, which allow for tax-advantaged distributions for the disabled beneficiary. The plans are modeled after the 529 College Savings Plan, where eligible expenses, in this case for disability, receive favorable tax treatment. These plans are offered by states and have annual contribution limits. In addition, there is a maximum cap on the value of the account in order to continue to receive public benefits. They are also subject to Medicaid pay back provisions.

Mistakes To Avoid

There are many landmines that must be carefully navigated around when planning for a child with special needs. At the top of the list, are three major situations that should be avoided.

1. Leaving assets directly to your child.
2. Naming the child as a direct beneficiary of your retirement plans, life insurance policy, or annuities.
3. Directing the assets set aside for your child to the care of a family member to administer on your behalf.

These mistakes may have dire consequences; from eliminating public benefits to exposing the assets to creditors and predators.

Conclusion

Planning for the needs of a loved one with special needs can be complex and consequential, but often create the opportunity for a better plan with more generous benefits. There are decisions to be made on pursuing different strategies, as well as assembling a team of advocates to care for the most vulnerable amongst us. By planning ahead, you can remove uncertainty and look to the future with anticipation rather than apprehension.

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